SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1897.

NO 134

A. B. ROFF,
Plaintiff in Error,
vs.
LOUISA BURNEY, Adm'x of
B. C. Burney, deceased,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

We think there can be no question as to the correctness of the Court's ruling in sustaining the demurer of plaintiff's complaint in this action. The language of the Act of May 2, 1890, (26 U. S. Stat. at large, page 94) Sections 30 and 31, quoted in plaintiff's brief, appears to us conclusive, of the fact that the United States Court was without jurisdiction to try this cause. Especially the last clause of Section 31, which reads as follows: "But nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of the exclusive jurisdiction over all cases arising wherein members of said Nations, whether by treaty, blood or adoption, are the sole parties, etc." The exclusive jurisdiction over controversies between members

of their own tribe was not conferred on the Choctaw and Chickasaw Courts by this Act of May 2, 1890, nor by the Act of 1889, which established the United States Courts in the Indian Territory, but was conferred by the treaties between said Indians and the United States. Article 7 of the Treaty of June 22, 1855, between the United States and the Choctaw and Chickasaw Indians provides that "The Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property within their respective limits; excepting, however, all persons with their property who are not by birth, adoption or otherwise citizens or members of either the Choctaw or Chickasaw tribe."—*Revision of Indian Treaties, page 277.*

From this it will appear that the exclusive jurisdiction of the tribal courts over controversies between citizens or members of the Choctaw and Chickasaw tribe was vested in them by treaty, or, rather, was recognized by treaty as inherent in them, the said tribes being at least quasi sovereignties.

It therefore cannot be true as contended by plaintiff that, by section 31 of the Act of 1890, or any of the other acts relating to the establishment of United States Courts in the Indian Territory, Congress intended to confer upon the tribal courts a jurisdiction which they did not have, namely, in controversies arising between certain classes of their own citizens, but it was clearly their intention to negative the idea that anything in these acts should be construed so as to deprive Indian Tribes of the exclusive right to determine controversies between their own members, which power belonged to them as sovereignties and had long been recognized by treaty.

If we are right in our contention, and it seems that

the above acts should, unquestionably, be so construed, then it is immaterial whether the plaintiff is a citizen by "blood, treaty or adoption," if he is a member of the Chickasaw Tribe as plaintiff alleges, and we admit that he is, the United States Court could have no jurisdiction to try a controversy between him and another member of the tribe. But we cannot forbear from calling the Court's attention to the glaring fallacy in the plaintiff's argument in which he undertakes to show that he is not a citizen by "adoption or treaty." If not a citizen of the Chickasaw tribe by adoption or treaty, where does he acquire his citizenship? He says he is a Chickasaw by intermarriage, that he married a member of the Chickasaw tribe in accordance with the marriage laws of said tribe, and thereby became a member of the tribe. By a well settled rule of International law the citizenship of a woman follows that of her husband. Then why should the rule be reversed when a man marries a woman who is a member of the Choctaw or Chickasaw tribe of Indians? The answer is plain: because the treaty between the tribes and the United States and the tribal laws passed in pursuance of the treaty provide that by such marriage the man shall become a member of the tribe. Article 38 of the Treaty of April 28, 1866, with the Choctaws and Chickasaws provides that, "Every white person who having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw Nation, or who has been adopted by the legislative authorities, is to be deemed a *member of said Nation*, and shall be subject to the laws of the Choctaw and Chickasaw Nations according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw."—*Revision of Indian Treaties, page 300.*

We therefore maintain that plaintiff, according to the allegations in his complaint is clearly a Chickasaw

by treaty, for it is the treaty above referred to that makes him a Chickasaw citizen.

It is a matter of history that prior to the treaty of 1866 the position of the intermarried men residing in the Indian Territory was anomalous, the jurisdiction of the tribal courts was denied, and the article, above quoted, was inserted in the treaty for the purpose of fixing their status in the Choctaw and Chickasaw Nations, making them members of the Nation and placing them under the jurisdiction of the tribal courts.

If we are right, then the complaint of the plaintiff that "he came to his own and his own received him not," cannot avail him, for if the United States Court has no jurisdiction over the cause, the fact that plaintiff alleges that "the courts of the Chickasaw Government have refused to entertain jurisdiction of any controversy between this plaintiff and a member of said tribe of Chickasaw Indians," could not confer the jurisdiction. But we wish to call the Court's attention to the fact that plaintiff does not show in his complaint that he ever sought relief in this cause from the tribal courts. He alleges in a general way that the Courts of the Chickasaw Government have refused to entertain jurisdiction on any controversy between this plaintiff and a member of the Chickasaw tribe, but nowhere does he allege that he made any effort to have the tribal courts entertain jurisdiction of this suit, and that they refused. The complaint was specially excepted to on this ground (R 5).

We think the United States Court had no jurisdiction to try this cause, and that the judgment sustaining the demurer and plea to jurisdiction was correct, and ask that it be affirmed.

Respectfully submitted.

H. C. POTTERF,
W. F. BOWMAN,
Counsel for Defendant in Error.